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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH CONFORTE AND SALLY CONFORTE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are entitled to a new trial on the ground that the trial judge erred in failing to disqualify himself from hearing petitioners' case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 624 F. 2d 869. The opinion of the district court (Pet. App. A26-A59) is reported at 457 F. Supp. 641.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1980. A petition for rehearing was denied on August 11, 1980 (Pet. App. B1). The petition for a writ of certiorari was filed on September 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a non-jury trial in the United States District Court for the District of Nevada, petitioners were convicted on four counts of willfully attempting to evade and defeat federal employment taxes for the last quarter of 1974 and the first three quarters of 1975, in violation of 26 U.S.C. 7201. The district court sentenced petitioner Joseph Conforte to consecutive terms of five years' imprisonment and a $10,000 fine on each of the four counts. Petitioner Sally Conforte was sentenced to consecutive terms of four years' imprisonment and a $10,000 fine on each of the four counts, but the prison sentences were suspended in favor of a five-year term of probation, made conditional upon her filing complete and accurate tax returns in future years (Pet. App. A32-A33 n.3).

The court of appeals vacated Joseph Conforte's prison sentence on the last three counts of the indictment, vacated the special conditions on Sally Conforte's probation, and, as to each petitioner, vacated the fines imposed on the last three counts of the indictment. The court of appeals affirmed the convictions as so modified (Pet. App. A1-A25).

The facts pertinent to the disqualification issue are set out in detail in the district court's opinion (Pet. App. A27-A40) and are summarized in the opinion of the court of appeals (Pet. App. A14-A15). Petitioner Joseph Conforte (hereinafter "Conforte") was, at the time of trial, the owner of a legal house of prostitution in Storey County, near Reno, Nevada (Pet. App. A27). Judge Bruce R. Thompson, the trial judge, was the only district court judge sitting in Reno, Nevada (Pet. App. A55). At the time of trial Conforte had been involved in at least four previous proceedings involving criminal charges or civil tax matters, all of them known to Judge Thompson (Pet. App. A27). These were: (1) a 1960 conviction in Nevada state court resulting in a state prison sentence; (2) a federal tax conviction in the District of Nevada based on a guilty plea that Conforte unsuccessfully sought to withdraw while serving his sentence, the motion being heard and denied by Judge Thompson; (3) a 1968 trial before Judge Thompson on a charge of violating the Mann Act, 18 U.S.C. 2421, ending with the grant of a motion of acquittal by Judge Thompson; and (4) a 1970 civil action brought by the Internal Revenue Service for condemnation and forfeiture of trailer houses used in Conforte's prostitution enterprise, ending in a decision by Judge Thompson in Conforte's favor (Pet. App. A27). Apart from his appearances in court, Conforte's personal contacts with Judge Thompson consisted of little more than the exchange of greetings on several occasions (Pet. App. A27-A28).

Before the start of the trial in this case, petitioners sought to waive their right to a jury trial. Upon hearing this application, Judge Thompson first made certain that petitioners' waiver was knowingly and intelligently made. He then put the following statement on the record with

respect to his knowledge of Conforte's criminal record, and received the following answers from petitioners and their counsel (Pet. App. A28-A30, n.2):

THE COURT:

> There is something else involved in this waiver of jury trial that should be brought out in the open. I am aware of Mr. Conforte's criminal record. Some years ago I passed upon a postconviction remedy motion that was filed on behalf of Mr. Conforte. I am aware of two trials in this court which involved Mr. Conforte, one in which I believe he was charged with a violation of the White Slave Traffic Act, and another which involved an effort to abate the operation of the so-called Mustang Ranch for Internal Revenue violations.
>
> Facts of that nature, if known to a juror prior to impanelment of the jury, would be a basis for disqualification of a juror. If I am going to be the trier of the facts in this case, I can't eliminate the knowledge I already have. So I want you to know—and you know what I know—that if I am going to preside over this trial without a jury, you will have to waive any basis of disqualification because of my prior knowledge of facts concerning Mr. Conforte primarily; I don't know much about Mrs. Conforte.
>
> Do you understand what I have told you?

MR. CONFORTE:

> Yes, sir.

MRS. CONFORTE:

> Yes, sir.

THE COURT:

Do you agree that I am not disqualified to try the case?

MR. CONFORTE:

I agree, sir.

THE COURT:

Do you, Mrs. Conforte?

MRS. CONFORTE:

Yes.

THE COURT:

Mr. Maxwell, is this proposed waiver of a jury trial with your approval and after full conferences and explanations with your client?

MR. MAXWELL:

[Mrs. Conforte's attorney]: It is, your Honor.

THE COURT:

Is that true of you, also, Mr. Brown?

MR. BROWN:

[Mr. Conforte's attorney]: Yes. We have discussed it for days, your Honor.

Judge Thompson accepted the waiver and tried the case without a jury. At the conclusion of the trial, he acquitted petitioners on the first six counts of the indictment[1] and convicted them on the remaining four. After filing notices of appeal, petitioners filed a motion for a new trial. The asserted ground was "newly discovered evidence" indicating that Judge Thompson had been personally biased and prejudiced against them at the time of trial (Pet. App. A32). The court of appeals remanded the case to permit consideration of the motion and assigned Judge Warren J. Ferguson of the Central District of California to hear the motion.

Judge Ferguson conducted an evidentiary hearing at which the following evidence, as summarized by the court of appeals (Pet. App. A14), was adduced. In 1972 Conforte submitted an application to the American Contract Bridge League's Reno Unit, of which Judge Thompson was then president. Members of the unit wished to reject his application because of his felony convictions and his proprietorship of a house of prostitution. At their request, Judge Thompson wrote the national headquarters of the Bridge League to ask whether the unit was permitted to reject Conforte's application.[2] The national headquarters responded that it could, and Judge Thompson wrote a rejection letter to Conforte on court stationery.

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[1]These counts charged petitioners with filing false employers' quarterly tax returns for six quarters in 1974, 1975, and 1976, in violation of 26 U.S.C. 7206(1).

[2]In the letter, Judge Thompson observed that "Mr. Conforte has twice been convicted of felonies, extortion and income tax evasion and has served terms in state and federal penitentiaries. He is a notorious bawdy house keeper and is presently engaged in that business in nearby counties" (Pet. App. A35 n.4).

In 1973 Judge Thompson attended a cocktail party following a university of Nevada football game. A discussion of fund-raising for the team occurred, and Conforte was mentioned as a possible contributor. Judge Thompson opposed accepting a contribution from Conforte because he ran a house of prostitution. He also stated that the only problem with one member of the athletic staff was that he was a good friend of Conforte, who, the judge observed, was "not good for Reno."[3]

After the hearing, Judge Ferguson denied petitioners' motion for a new trial (Pet. App. A26-A59). The court of appeals affirmed. In affirming, the court held that the motion for a new trial was properly denied for three reasons: first, to the extent that it rested on the bridge club incident, the motion was properly denied as untimely (Pet. App. A14-A16); second, the remarks made by Judge Thompson at the university function did not demonstrate reasonable grounds for finding that the judge could not try the case fairly (Pet. App. A16-A20); and third, petitioners' waiver of a jury trial, permitting their trial by Judge Thompson despite his knowledge of Conforte's criminal record, was knowingly and intelligently made (Pet. App. A20).

ARGUMENT

Petitioners advance four contentions in support of their argument that they were entitled to a new trial because of the trial judge's failure to disqualify himself. All are without merit, and none raises an issue as to which the decision below squarely conflicts with a decision of this Court or of any court of appeals.

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[3]Judge Thompson testified that his low opinion of Conforte's character was based on his knowledge of Conforte's criminal record (Deposition of Judge Thompson at 32; see also *id.* at 20).

1. Under 28 U.S.C. 455(a), a judge is obligated to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," and 28 U.S.C. 455(b) states specific circumstances in which disqualification is obligatory, including the existence of "personal bias or prejudice concerning a party." Pursuant to 28 U.S.C. 455(e), a judge may accept a waiver of disqualification from the parties if disqualification would be based on Section 455(a) and if the waiver "is preceded by a full disclosure on the record of the basis for disqualification"; but no such waiver is permitted if the ground for disqualification is one of those specified in Section 455(b).

Petitioners contend (Pet. 14-15) that, even assuming that Section 455(a) was the only ground for disqualification, no waiver of disqualification was permissible here because the 1977 version of Canon 3 of the *Code of Judicial Conduct for United States Judges* in effect at the time they made their new trial motion (Pet. App. D2-D3) imposed disqualification obligations similar to those in 28 U.S.C. 455, but precluded waivers under any circumstances. They contend that the Code, rather than the statute, controlled disposition of their motion.

As the district court reasonably observed, however (Pet. App. A49), "the disqualification provisions of the Code of Conduct can only be construed as establishing a standard for judicial behavior rather than as imposing a mandatory duty enforceable after the fact by the reversal of otherwise proper judicial decisions." The Code thus did not replace Section 455 as a basis for obtaining a new trial. But in any event, Canon 3 of the Code was amended in 1979 to bring it into conformity with Section 455, and it now permits a waiver of disqualification where, as here, the only ground is that a judge's impartiality might reasonably be

questioned. *Code of Judicial Conduct for United States Judges*, Part I at I-14, I-18d. Thus petitioners' contention has no continuing significance and does not warrant further review.

2. Petitioners also contend (Pet. 15-18) that their Section 455(e) waiver was invalid because Judge Thompson did not, at the time of the waiver, inform them of the bridge club letter he had written or his remarks at the university function. But as both courts below correctly held (Pet. App. A20, A47-48), petitioners were on notice that Judge Thompson was aware of Conforte's prior encounters with the criminal justice system. Because his knowledge of that record was the basis for his negative views towards Conforte, petitioners had sufficient information to make the waiver decision. Judge Thompson revealed that Conforte's prior brushes with the criminal justice system and the Internal Revenue Service had remained in his memory, and it should surely have occurred to petitioners that such knowledge would not induce a favorable view of Conforte's character. Moreover, as the district court observed (Pet. App. A47-A48), "full disclosure" cannot reasonably be construed as imposing on a judge "the impossible task" of reciting remarks he does not recall having made. In any event, this fact-bound issue does not warrant further review.

3. Petitioners also contend (Pet. 19-22) that the courts below erred in finding that Judge Thompson did not have a personal bias or prejudice concerning Conforte within the meaning of Section 455(b)(1)—a ground as to which the statute permits no waiver. This contention rests on a misconstruction of the term "personal," which, as used in Section 455 (or the similarly-worded 28 U.S.C. 144), stands "in contrast with judicial; it characterizes an attitude of extra-judicial origin * * *." *Craven* v. *United States*, 22 F. 2d 605, 607 (1st Cir.), cert. denied, 276 U.S.

627 (1927). Accord, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Haldeman*, 559 F. 2d 31, 132, 135-136 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). As the district court properly found (Pet. App. A53), Judge Thompson's opinion of Conforte was derived from the facts disclosed in the various judicial proceedings in which Conforte had appeared before him. Furthermore, "personal bias" has been defined as "an attitude toward [a litigant] that is significantly different from and more particularized than the normal, general feelings of society at large against convicted wrongdoers." *Mims* v. *Shapp*, 541 F. 2d 415, 417 (3d Cir. 1976). Petitioners failed to show that the attitude of Judge Thompson, who knew from official proceedings that Conforte operated a house of prostitution and was a twice-convicted felon, was different from popularly held views concerning persons with criminal records engaged in that trade.[4] Accordingly, the courts below were correct in holding that Judge Thompson had no "personal bias or prejudice" in the statutory sense concerning Conforte.

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[4]Petitioners also contend (Pet. 21) that the "savage 20-year sentence imposed on Joseph Conforte * * * constitutes convincing evidence of Judge Thompson's personal bias and prejudice." But as the court of appeals observed (Pet. App. A21), "the record makes clear that the sentences were imposed to test [petitioners'] right to file *Sullivan-Garner* returns and not because of any personal bias against them." Furthermore, as the following colloquy from Judge Thompson's deposition shows, it was apparent to all concerned that the 20-year sentence was not meant to stand (Deposition of Judge Thompson at 25-26):

> Q. [by Conforte's attorney] At the time the additional fifteen-year sentence was imposed, was it your intention, sir, that if the sentence was affirmed on appeal that you would reduce the sentence if a subsequent motion to modify was brought?
>
> A. Yes. I think that is probably the only time * * * that you ever heard a judge preface a sentence with a statement to the defendant that he had rights under Rule 35 to move to modify.

4. Petitioners finally contend (Pet. 23-24) that the courts below erred in holding that the motion for a new trial, insofar as it was based on the "newly discovered" bridge club letter written by Judge Thompson, was untimely; and they assert a conflict with decisions of other circuits on the question whether a disqualification motion based on 28 U.S.C. 455 and alleging personal bias or prejudice is subject to any timeliness requirement.

As petitioners point out, Section 455 contains no express timeliness requirement. The "personal bias and prejudice" subsection of that provision, however, is *in pari materia* with 28 U.S.C. 144 (*In re International Business Machines Corp.*, 618 F. 2d 923, 928 (2d Cir. 1980), citing *Davis* v. *Board of School Commissioners of Mobile County*, 517 F. 2d 1044, 1052 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976)); and Section 144 *does* require that a motion to disqualify be timely made.[5] This timeliness requirement has, accordingly, been declared applicable to a personal bias claim under Section 455 as well. *In re International Business Machines Corp.*, *supra*, 618 F. 2d at 932; *United States* v. *Daley*, 564 F. 2d 645, 651 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978). See also *United States* v. *Patrick*, 542 F. 2d 381, 390 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). As the district court noted (Pet. App. A44 n.7): "[To conclude otherwise] would allow any litigant to evade the procedure established in section 144 by simply ignoring that section in favor of section 455. The result would be to effectively repeal section 144 and render it meaningless." See *Rousell* v. *Tidelands Capital Corp.*, 438 F. Supp. 684, 691 (N.D. Ala. 1977). See also *Johnson* v. *United States*, 318 U.S. 189, 201 (1943).

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[5] The text of 28 U.S.C. 144 is reprinted at Pet. App. D1-D2.

The cases on which petitioners rely (Pet. 23) are all distinguishable. In three of them, *Potashnick* v. *Port City Construction Co.*, 609 F. 2d 1101 (5th Cir. 1980), cert. denied, No. 79-1522 (Oct. 6, 1980); *SCA Services, Inc.* v. *Morgan*, 557 F. 2d 110 (7th Cir. 1977), and *United States* v. *Amerine*, 411 F. 2d 1130 (6th Cir. 1969), the claims concerned the relationship of the judge or his relatives to one of the parties, not claims of personal bias. No overlap between Section 144 and Section 455 was involved, and thus the question of the interaction between those provisions was not there presented. In the other two cases, *Davis* v. *Board of School Commissioners of Mobile County*, *supra*, and *United States* v. *Brown*, 539 F. 2d 467 (5th Cir. 1976), claims of bias were involved but no timeliness issue was presented. In Davis, which affirmed the trial judge's denial of the motion to disqualify, the motion had been made early in the proceedings and was clearly timely. In *Brown*, the motion, although made years after trial, was filed promptly once the facts relating to the trial judge's apparent bias were made known to the defendant. In the present case, by contrast, Conforte, although having personal knowledge that Judge Thompson had been involved in the rejection of his bridge club application, not only did not move to disqualify Judge Thompson, or at least remind him of the incident, but rather asked the judge to try the case without a jury. The present case thus clearly did present a timeliness question, which the courts below properly resolved against petitioners.[6]

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[6]Petitioners argue (Pet. 23) that the failure of Congress, despite the Justice Department's recommendation, to insert a timeliness requirement into Section 455 when it amended that section in 1974 indicates that Congress wished to allow Section 455 disqualification motions to be made at any time. Under old Section 455, however, courts assumed a timeliness requirement. See, *e.g.*, *Zovluck* v. *United States*, 448 F. 2d 339, 343 (2d Cir. 1971), cert. denied, 405 U.S. 1043 (1972). Thus, Congress' failure to act on the Justice Department's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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suggestion could just as reasonably be construed as evidence that Congress was satisfied with the then-existing judicial gloss on Section 455 and saw no need for additional legislation.

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